III. Statutory provisions substantially similar to those of Section 19g of the New Jersey Unemployment Compensation Law are found in 20 other states*, and affect a great number of contractors, subcontractors and their employees. The question of the liability of contractors to pay a tax measured in part by the employees of their subcontractors is one of wide public concern and should be set at rest by decision of this Court.

For these reasons it is respectfully submitted that this petition should be granted.

LOUIS B. LEDUC,
Attorney of Petitioner.

Camden, New Jersey,
April 2, 1943.

BRIEF IN SUPPORT OF THE PETITION.

OPINIONS OF THE COURTS BELOW.

The opinion of the New Jersey Supreme Court was rendered by Chief Justice Brogan. It appears in the record submitted herewith (S. of C., pp. 42-50), and is published in 129 N. J. L. 28; 28 A. (2d) 46.

The New Jersey Court of Errors in affirming adopted as its own the opinion of the Chief Justice (S. of C., p. 53).

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* This total is drawn from the Prentice-Hall service on this legislation.

THE STATUTE INVOLVED.

This cause involves the New Jersey Unemployment Compensation Law, which may be found in New Jersey Revised Statutes 43:21-1 to 43:21-24. The pertinent sections of the statute are R. S. 43:21-19, sub-paragraphs (g) and (h), which, together with 21-19 (i-6) and 21-8c, are set forth in the Appendix hereto (the challenged part of 21-19g being italicized).

JURISDICTION.

Jurisdiction is invoked pursuant to Section 347 of 28 U. S. C. A., and as more particularly set forth in the foregoing petition.

STATEMENT OF THE CASE.

The Summary Statement in the foregoing petition contains all material facts.

The points of law to be considered are therein set forth in the "Reasons Relied On For Allowance of the Writ."

ARGUMENT.

I. That portion of N. J. R. S. 43:21-19g, which taxes contractors on the basis of their subcontractors' employees, violates the "due process" and "equal protection" clauses of the Federal Constitution.

Our submission is that the state court should have held this statutory provision to be unreasonable, discrimina-

tory and invalid under the 14th Amendment to the Federal Constitution for the several reasons hereinafter advanced, viz.:

(a) It Imposed a Fictitious Premise as the Basis for Taxation and Bound the Taxpayer by the Fiction.

In the words of the act, the contractor—"* * * shall be deemed to employ each individual in the employ of each * * * subcontractor." This enforced assumption is wholly opposed to reality. The contractor has no control over the subcontractor, has no relations with the latter's employees and cannot force his subcontractor to open his books to him or to disclose the names, the numbers or the wages of his workmen.

This Court in *Heiner v. Donnan* (1931), 285 U. S. 312, 329, said of a similar statutory enactment:

> "* * * it constitutes an attempt by legislative fiat to enact into existence a fact which here does not and cannot be made in actuality."

To like effect are:

Schlesinger v. Wisconsin (1925), 270 U. S. 230, 240;

In Re Chicago, etc., R. Co. (C. C. A. 7th Cir., 1937), 90 F. 2nd 312, 316;

Commissioner of Internal Revenue v. Shattuck (C. C. A. 7th Cir., 1938), 97 F. 2nd 790, 792.

This assumed premise is not subject to rebuttal by the taxpayer and for this reason violates "due process," as this Court has held in *Hoeper v. Tax Commission*

(1931), 284 U. S. 206, 215; *Manley v. Georgia* (1928), 279 U. S. 1, 6; *Mobile, etc. R. Co. v. Turnipseed* (1910), 219 U. S. 35, 43; *Knowlton v. Moore*, 178 U. S. 41, 77; and *Nichols v. Coolidge*, 274 U. S. 531, 540. Of like effect is the recent state decision of *Kellogg v. Murphy* (Mo., 1942), 164 S. W. (2d) 285, 293-294.

(b) It Introduced a Subclassification that Contravened the Act's Basic Principle of Classification.

The Law, in fixing the minimum of eight employees to establish taxable status for an employer, necessarily creates two classes: one of employers who have seven or less employees and are exempt from the tax, the other of employers who have eight or more employees and are liable to the tax.

This being so, the obvious effect of the statutory provision taxing a contractor who has less than 8 employees, if the number of his subcontractors' employees brings this total to 8 or more, is to take such contractor out of the exempt class in which the general purpose and policy of the statute has placed him and to throw him into the taxable class.

This is subclassification, and subclassification by the New Jersey decisions is discriminatory and unlawful. *Koch v. Essex County Board of Taxation* (S. C. 1921), 97 N. J. L. 61, and *Central Railroad Co. v. State Board of Taxation* (E. & A. 1886), 48 N. J. L. 146. See also Cooley on Taxation, Section 353.

This unique classification of subject contractors measured by the total of their employees and of those of their subcontractors vitiates the central principle of tax liability laid down in the Act. The fixing of a minimum

number of employees as a measure of taxability was derived from the ascertained fact that unemployment occurs to a greater extent in large than in small establishments.

> "* * * the legislative choice finds support in the conclusion reached by students of the problem that unemployment is less likely to occur in businesses having a small number of employees." Per Mr. Justice Stone, in *Carmichael v. Southern Coal Co.* (1936), 301 U. S. 495, 521. See also W. I. King, Employment Hours and Earnings in Prosperity and Depression; Hansen, Bjornaraa, and Sogge, Decline of employment in the 1930-1931 depression in St. Paul, Minneapolis and Duluth, U. of Minn., Employment Stabilization Research Institute, vol. 1, No. 5, pp. 20-25.

A further consideration was the recognition that the extra bookkeeping and administrative work required by small units was not justified.

> "It was deemed necessary to draw the line somewhere in order that the plan be not too cumbersome and unwieldy."
>
> *Gillum v. Johnson* (S. C. Cal. 11-25-36; rehearing denied 12-21-36); 62 P. (2nd) 1037, 1044.

If relatively greater unemployment exists in larger rather than in smaller units, there is certainly no point to combining a number of the smaller employers in order to make a larger and taxable unit. Nothing could be more artificial. The sum of its parts becomes greater than the whole. The result is to provide unemployment compensation for a class of employees (i. e., those less than 8 in number) who, measured by the basic theory of the act, do not need protection. A manufacturer of heating or refrigerating equipment who supplies his product to

the builder of a dwelling house has nothing in common with other subcontractors working on the same house, but his thousands of employees may make them all, as well as their contractor, liable to the tax, where otherwise there would be no liability.

Liability to the tax is thus seen to depend upon purely fortuitous circumstances, which, besides, contravene the central principle of the Act to limit taxation of employers to those having eight or more employees. The subclassification whereby employers with less than eight employees who engage subcontractors, whose employees added to those of the contractor total eight or more, is thus shown to be irrational and unscientific, hence arbitrary and unlawful.

Truax v. Corrigan, 257 U. S. 312, 332;
Southern Rwy. Co. v. Greene, 216 U. S. 400, 417;
Gulf, etc. Ry. Co. v. Ellis, 165 U. S. 155;
Colgate v. Harvey, 296 U. S. 404, 423.

(c) It Required the Petitioner to Pay an Excise Tax on Another Man's Privilege.

The tax levied upon employers is an excise upon the privilege of employing others. *Howes Brothers Co. v. U. C. C.* (S. C. Mass., 1936), 5 N. E. (2d) 720, 730 (cert. den., 57 S. Ct. 434, 81 L. Ed.). Therefore, it is justified only insofar as it is imposed upon the privilege of the contractor to give employment to his workers. To tax petitioner for the privilege of hiring his workmen is one thing; to tax him for the same privilege of employment by his subcontractors is a wholly different thing. The latter is not a tax at all. It is an arbitrary imposition requiring one man to pay for another's privilege. *Montgomery v. Bramford* (S. C. Conn., 1929), 147 Atl. 9.

(d) Its Effect was Necessarily to Discriminate Unfairly Against Petitioner and His Class.

The petitioner was required to pay a tax based on what was done by other men over whom he had no control. Employers other than "contractors" may lawfully limit their employees to seven and thereby escape taxation—this choice is plainly given them by the Act—but our contractor, if he has but one employee, must pay the tax if his subcontractor, whom he does not control, employs as many as seven additional workmen.

Or even if he elects to accept a taxable status based on eight or more employees, he will have to pay an additional tax—in excess of what any other employer under the act must pay—on every employee of a subcontractor who employs less than a total of eight. If he has 20 employees on his own payroll and contracts for the services of 5 subcontractors, each of whom hires 5 workmen, he will pay a greater tax on his subcontractors' employees than he will on his own. No other employer under the act is similarly burdened.

Holding that imposition of a greater tax burden upon one class of taxpayers not scientifically differentiated from another and favored class violates "due process" are the New Jersey decisions of:

Weimer Storage Co. v. Dill (Ch. 1928), 103 N. J. Eq. 307, 143 A. 438;

Trenton Savings Fund v. Richards (S. C. 1889), 52 N. J. L. 156;

Lang v. Berrien (S. C. 1908), 77 N. J. L. 214.

See also:

Independent Gas Co. v. Unemployment Commission (Ga., 1940), 10 S. E. (2d) 58, 60;

Jack Ulmer, Inc. v. Daniel (So. Car., 1940), 7 S. E. (2d) 829, 832.

II. The imposition of penalties for failure to report subcontractors' employees when petitioner had no means of ascertaining these was a taking of his property without due process of law.

Raines was charged in the assessments under review with penalties totaling $154.48 (S. of C., pp. 23 and 26) for failure to report the wages of employees of his subcontractors. As he did not, and could not, know either the number of these employees or their wages (S. of C., p. 29, lines 8-10), it was impossible for him to make the required report. The Commission undertook to penalize him for failing to do the impossible. This, we suggest, is a taking of property without due process of law.

A penalty is an exaction for punitive purposes. It follows an offense of some sort and is intended to discourage repetition of the offense.

> *U. S. v. Buckingham,* 261 Fed. 418, 419;
> *U. S. v. Birmingham Trust, etc. Co.,* 258 Fed. 562;
> *U. S. v. Nash,* 111 Fed. 525;
> *People v. Sloane,* 90 N. Y. S. 762.

But there can be no offense where there is no fault. And the contractor cannot be put in the wrong in failing to report subcontractors' wages while he is deprived of the means of securing this information.

While the right is given the Commission by the act to summon witnesses and to inspect records (R. S. 43:21-11i), no similar right is vested in the contractor-employer. (The contrary suggestion in the opinion below (p. 49) is erroneous.)

CONCLUSION.

The New Jersey Supreme Court announced its decision as to the validity of the questioned statutory provision in terms of conclusion rather than of analysis. A reading of the opinion below by the learned Chief Justice leaves us unenlightened as to the reasons which impelled the court's conclusions. We find only such statements of the obvious as—"All who come within the purview of the classification are included in it" (S. of C., p. 47, line 22). The questions raised by this litigation, it is submitted, deserve a more illuminating response by the court. The issue of validity is a large one measured either by the number of individuals affected or by the total wealth that their taxes bring to the state treasury. The asserted right of a state to command the resources of contractors by counting employees of their subcontractors and indulging the arbitrary presumption that the latter are in fact employed by the contractor invites, we submit, the considered judgment of this Court.

Respectfully submitted,

LOUIS B. LEDUC,
Attorney of Petitioner.